No. 82-794

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

MILDRED PETERS, *et al.*,

*Petitioners,*

—v.—

WAYNE STATE UNIVERSITY, TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## RESPONSE OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND RESPECTING CERTIORARI

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## RESPONSE OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND RESPECTING CERTIORARI

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Respondents Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF")[1] believe that the decision of the Sixth Circuit

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1 Pursuant to Rule 28.1 of this Court, TIAA-CREF state as follows: (1) *Parents.* All of TIAA's capital stock is held by Trustees of TIAA Stock, a not-for-profit, non-stock, New York

below, which petitioners here seek to have reviewed, is in all respects correct.[2] On the merits TIAA-CREF would therefore oppose the granting of certiorari here. The present circumstances, however, dictate a different response. For the reasons set forth below, TIAA-CREF do not oppose certiorari.

As pointed out in TIAA-CREF's Petition for Certiorari in *Spirt* (pp. 9-11), the decisions in *Spirt* and *Peters* are in direct conflict in a number of important respects including, most importantly, whether an insurer's use of sex-distinct mortality tables violates Title VII (42 U.S.C. §§ 2000e, *et seq.*) or contravenes this Court's decision in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). The effect of this conflict poses grave uncertainties for TIAA-CREF, its more than 600,000 annuitants and over 3,400 participating institutions, as well as for the entire pension and insurance industries, and its prompt resolution is vital. Unless resolved, this conflict will persist within TIAA-CREF's nationwide pension system—with the Second Circuit's decision finding discrimination where the Sixth Circuit has found none.

The issues raised in *Spirt* and *Peters* are significant. The proper application of *Manhart's* holding outside the narrow scope of that case is a vexing question that has

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membership corporation. CREF itself is a not-for-profit, nonstock, New York membership corporation. Seven persons serve both as members of CREF and of Trustees of TIAA Stock. (2) *Non-wholly owned subsidiaries and affiliates.* TIAA owns 50% of the issued and outstanding stock of North Coast Investment Corporation, a Delaware corporation.

2 Any suggestion (Petition for Certiorari pp. 40-41) that summary reversal here would be appropriate is baseless. *See, e.g.*, TIAA-CREF's *amicus* brief in *Arizona Governing Committee, et al.* v. *Norris*, 51 U.S.L.W. 3287 (U.S. October 12, 1982) (No. 82-52) pp. 7-25.

been addressed by a number of lower courts (*see* TIAA-CREF's Petition in *Spirt*, pp. 11-14). The question of extending Title VII's application outside the employer-employee context is also squarely raised in *Spirt* and *Peters*, as is the question of whether discriminatory intent or animus need be shown as a necessary element of a plaintiff's Title VII case. The exemption from unintended federal intervention into the business of insurance provided by the McCarran-Ferguson Act (15 U.S.C. §§ 1011 *et seq.*) and the propriety of granting retroactive relief in these circumstances are involved in *Spirt* but were not reached in *Peters* where no discrimination of any kind was found. These issues are important and should, we submit, be resolved.

Finally, TIAA-CREF urge that if the *Spirt* and *Peters* petitions for certiorari are granted they be set down for argument on the same date as argument is heard in *Arizona Governing Committee, et al.* v. *Norris*, 51 U.S.L.W. 3287 (U.S. October 12, 1982) (No. 82-52). As Wayne State notes in its memorandum supporting certiorari (at p. 2), the conflict between the Second and Sixth Circuits "cannot reasonably be resolved by the Court's impending decision in [*Norris*]. The *Norris* facts and the *Norris* issues are significantly different from the TIAA-CREF facts and issues." The question of *Manhart's* proper scope and application should not be undertaken in *Norris*, we respectfully submit, without the benefit of the record and the broader legal issues and factual circumstances presented by this case and *Spirt*.

## Conclusion

For all the foregoing reasons, respondents TIAA-CREF do not oppose certiorari.

Respectfully submitted,

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